(16)

No. 289

Office - Supreme Court, U. S.
FILED
JUL 26 1944
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

W. S. D. SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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STANLEY J. PADDEN,
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THE ARGUS PRESS, SEATTLE

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IN THE

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OCTOBER TERM, 1944

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No.....

PETITION FOR WRIT OF CERTIORAI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The undersigned on behalf of W. S. D. Smith prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on May 29, 1944, affirming a decision of the District Court of the United States in and for the Western District of Washington, Northern Division.

OPINION

The opinion of the court below (R. 47-51) was entered on May 29, 1944. There was no opinion in the District Court but the court in its findings re-

cited that the decision of the Supreme Court of the United States in the case of *Custer v. McCutcheon*, 283 U. S. 514, 519, and the case of *Schodde v. United States*, 69 F.(2d) 866, entitled the plaintiff to judgment (R. 34).

JURISDICTION

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A., §347).

STATUTES INVOLVED

The statute involved is 28 U.S.C.A., §791, and other relevant statutory provisions are set forth in the appendix.

STATEMENT OF FACTS

The petitioner was convicted in February, 1924, in the United States District Court of California in an indictment charging conspiracy to violate the United States Custom Laws and the National Prohibition Act, and on other substantive counts charging law violation (Indictment R. 10-20).

On April 25, 1924, the petitioner was sentenced to serve two years in prison and pay a fine of Ten Thousand Dollars ($10,000) and on each of the other counts he was fined One Dollar ($1.00) (R. 25). Thereafter execution was issued in California on the judgment, and the amount of Fifty-one Dollars Thirty-five Cents ($51.35) was realized thereon. Smith served his prison sentence, and being with-

out funds executed the pauper's oath, and served an additional thirty days, and was then discharged from custody. Petitioner then migrated to Seattle in 1928. No further action was taken until 1941 when the instant action was commenced in the United States District Court for the Western District of Washington at Seattle, by the filing of a complaint based on the California judgment against the petitioner on April 1, 1941 (R. 2). The agreed Statement of Facts (R. 6-9) set forth more fully the recital.

It is the contention of the petitioner that under the laws of the United States the 1924 California Federal judgment cannot be enforced through the 1941 Washington action because of the limitation provided in the Federal Statutes, and further because it would be inequitable to subject petitioner's after-acquired property to the lien of the judgment after having taken all of the property then owned by him and requiring him to serve an additional thirty days.

SPECIFICATION OF ERRORS TO BE URGED QUESTIONS PRESENTED

The Circuit Court of Appeals erred:

(1) In failing to hold that the action was for a penalty and therefore barred by the provisions of Federal Statute 28 U.S.C.A. 791, which was a part of a general act enacted by the Congress concerning the judicial system of the United States courts.

(2) In applying the Act of March 2, 1799 (1 Stat., Chapter 22) to respondent's action.

(3) In holding that Section 28 U.S.C.A. 791 did

not apply to criminal judgments and holding that the decisions of the Supreme Court of the United States on limitations in civil actions were applicable.

(4) In holding that a pauper who served the time required by law to free him from imprisonment remains continually liable for the penalties of fine more than five years from the date of the accrual of the action.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is in direct conflict with the statutory laws of the United States.
2. The Circuit Court of Appeals has decided an important question of federal law which has not, but should be settled by this court and which affects the financial status of many citizens convicted under the various laws of the United States, who, if the decision is allowed to stand, may be deprived of the property which they acquire after being rehabilitated.
3. The court erred in affirming the judgment of the District Court.

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BRIEF IN SUPPORT OF PETITION

The basic issue presented to the court below was whether the following statute is applicable to respondent's action.

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained except in cases where it is otherwise specifically provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."
>
> Title 28, U.S.C.A., Sec. 791.

This statute was a part of a general act enacted on February 28, 1839, and which is captioned an act in amendment of the acts representing the judicial system of the United States and is Section 4 thereof. We have set forth all of the provisions of the act in the appendix.

The Circuit Court in its opinion did not deem that

the statute was applicable, and announced its conclusions in the following words:

> "The quoted federal statute on which appellant leans is found in its present form in R.S. §1047. It appears to have had its genesis in the Act of March 2, 1799, 1 Stat. 627, c. 22, regulating the collection of duties on imports and tonnage. Section 89 of this Act provided in what manner 'penalties, accuring by any breach' of the act should be sued for. This section concluded with a proviso to the effect that 'no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred.'
>
> "It is clear from the text of the 1799 Act that the phraseology relating to the 'accrual' or 'incurring' of the penalty or forfeiture has reference only to the commission of the act or offense by which the penalty or forfeiture was incurred. Similar verbiage is found in other limitation statutes of the period." (R. 49)

It is our contention that the court is in error because the 1799 Act referred to a specific subject, while the Act of February 28, 1839, passed subsequently was a general act covering all causes of actions. This is fully discussed in the case of *U. S. v. Maillard*, 26 Fed. Cas. 1140, case No. 15,709. The relevancy of the 1799 Act was not a subject of discussion in the briefs or arguments of counsel, but was introduced by the court in its opinion.

The court in its opinion further stated, "verbiage of existing statute, that is to say the phrase, 'time when the penalty or forfeiture accrued,' has refer-

ence merely to the commission of the offense and the doing of the act for which the penalty or forfeiture was incurred" (R. 50) We cannot agree with this reasoning for at the time of the commission of the offense no one could tell what amount might be due, if anything, until the conviction had occurred, and then only if a fine was imposed. The petitioner might have been acquitted. The sentence might have been for imprisonment only, and the penalty of fine was ascertained when the 1924 judgment was imposed, and the respondent was then possessed of an enforceable legal right and the statute was then applicable. Some questions may arise in regard to the fact that the word "fine" is not specifically mentioned in the statute. Penalty is a generic term, it has been applied to civil and criminal proceedings. It has been held to include both fine and forfeiture, but it generally has been understood as an exaction demanded by the state for an infraction of its laws. The father of our jurisprudence placed it in the criminal branch and the profession generally has spoken of the "Penalty of the law" when referring to the punishment inflicted upon a wrongdoer. A fine certainly is punishment. Imprisonment is also punishment. The appellant was sentenced to these penalties. How can it be said which part of his sentence was a penalty and which part was not penalty. The judgment was his penalty. We do not desire to burden the court with extensive quotations, but content ourselves with the following cases which support our contention that "a fine is always a penalty, although a penalty is not always a fine."

Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549, 66 L. ed. 1061;

Regal Drug Corp. v. Wardell, 260 U.S. 386, 43 S.Ct. 152, 67 L. ed. 318;

Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L. ed. 1123;

St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. ed. 139;

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198;

Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L. ed. 1232;

Life & Casualty Ins. Co. v. McCray, 291 U.S. 566, 78 L. ed. 987;

U. S. v. Constantine, 296 U.S. 287, 80 L. ed. 233;

United States v. Smith, Kline & French Co. (D. C.) 184 Fed. 532;

U. S. v. Springer & Lotz, 4 F. Supp. 253;

Schick v. U. S., 195 U.S. 65, 49 L. ed. 99;

U. S. v. Tsokas, 163 Fed. 129;

U. S. v. Moore, 11 Fed. 248.

It is our contention that the cited statute placed a time limit upon the enforcement of the judgment. It may be noted that this action is based on a judgment of fine, for it appears to us it is a "suit" or a "prosecution" for a "penalty." Again it may be suggested that if the Circuit Court's reasoning that no time limit is fixed for the enforcement of a penal judgment is correct, then there is at the present time a judgment in full force and effect in California against the petitioner and another judgment for the

same offense in the United States District Court for Western Washington. Both are for the same violations. If there is no time limit for the enforcement of a penal judgment, then the California judgment is valid and subsisting and could be executed upon, and the Washington judgment is also subject to the same process. This could cause a very unjust result. We see no necessity of making an exception for a penal judgment in the case because the wording of the pertinent statute has only one exception, and that is, "except in cases where it is otherwise specifically provided." We have found no specific provision in the statutes for the continuance of penal judgments and we do not believe the court should engraft upon a statute of limitation an exception which the statute itself does not make.

We do not believe the *Schodde* and *McCutcheon* cases *supra*, which the trial court relied on and the decisions referred to in the circuit court's opinion are in point as they involve limitations on civil action and did not consider the five-year "penalty" statute.

Chief Justice Marshall in discussing in an early case under a penal statute, whether an action of debt could be maintained without limitation, when the information was barred by the statute of limitation, stated

> "In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it

could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

Adams v. Woods, Cranch 2 (U.S.) 336, 2 L. ed. 297.

This case has more than passing significance. It involves not only this party, but all others who have transgressed the law and have later restored themselves to good citizenship. It involves the rights of every poor and indigent prisoner who comes before the courts in the future. The theory of our punishment of law violation is to permit the party to pay his debt to society and then start over a new life. The Circuit Court's decision, if allowed to stand, would have a depressing effect upon every prisoner in humble circumstances because it would create for him a continuing liability from which he could not escape. There would be no incentive for a prisoner to attempt to re-habilitate himself because all opportunity for such would be lost. The petitioner in this case was a pauper at the time of his conviction and the government took from him all his property, and it does not now claim that he concealed or withheld any funds or property at the time of his release from prison. It required him also to serve an additional thirty days before his discharge (R. 7). No credit in the judgment is allotted to the petitioner for this confinement. Liberty is a precious right and the petitioner served thirty days, but now receives no credit for it. Ordinarily we associate a fine with a minor offense. If the judgment is allowed to stand, the effect of it would be to make the fine a life time penalty. There is no reason to en-

graft an exception on the statute because of the fact the United States is a party for the reason that the Congress under our construction of the pertinent statute has legislated otherwise. The facts and circumstances of the case should have a peculiar appeal from the standpoint of human welfare. The Government should not be permitted to revisit on the petitioner, or any defendant, at so late a date penalties for a violation long since paid for.

Counsel for the petitioner certify that in their opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

CHARLES P. MORIARTY,
STANLEY J. PADDEN,
Counsel for Petitioner.

APPENDIX

United States Statutes at Large 5, 25th Congress, Sess. III., Chap. XXXVI, Statute III, Feb. 28, 1839

An Act in amendment of the acts respecting the Judicial System of the U. S.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit.

Sec. 2. And be it further enacted. That all the circuit courts of the United States shall have the appointment of their own clerks; and in case of a disagreement between the judges the appointment shall be made by the presiding judge of the court.

Sec. 3. And be it further enacted. That all pecuniary penalties and forfeitures accruing under the laws of the United States may be sued for and recovered in any court of competent jurisdiction in the State or district where such penalties or forfeitures have accrued, or in which the offender or offenders may be found.

Sec. 4. And be it further enacted, That no suit or

prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued; Provided, the person of the offender or the property liable for such penalty or forfeiture shall, within the same period, be found within the United States; so that the proper process may be instituted and served against such person or property therefor.

Sec. 5. And be it further enacted, That the punishment of whipping and the punishment of standing in the pillory, so far as they now are provided for by the laws of the United States, be, and the same are hereby abolished.

Sec. 6. And be it further enacted, That, in all cases of recognizances in criminal causes taken for, or in, or returnable to, the courts of the United States, which shall be forfeited by a breach of the condition thereof, the said court for or in which the same shall be so taken, or to which the same shall be returnable, shall have authority in their discretion to remit the whole or a part of the penalty, whenever it shall appear to the court that there has been no wilful default of the parties, and that a trial can notwithstanding be had in the cause, and that public justice does not otherwise require the same penalty to be exacted or enforced.

Sec. 7. And be it further enacted, That the second section of the act of congress, passed the twenty-ninth day of April, one thousand eight hundred and two, which makes it the duty of the associate justice of the Supreme Court, resident in the fourth circuit, to attend in the city of Washington, on the first Monday of August annually, to make orders respecting the

business of the Supreme Court, be, and the same, is hereby, repealed.

Sec. 8. And be it further enacted. That in all suits and actions in any circuit court of the United States in which it shall appear that both the judges thereof or the judge thereof, who is solely competent by law to try the same, shall be any ways concerned in interest therein, or shall have been of counsel for either party, or is, or are so related to or connected with either party as to render it improper for him or them, in his or their opinion, to sit in the trial of such suit or action, it shall be the duty of such judge or judges, on application of either party to cause the fact to be entered on the records of the court; and also to make an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the most convenient circuit court in the next adjacent State, or in the next adjacent circuit; which circuit court shall, upon such record and order being filed with the clerk thereof, take cognizance thereof in the same manner as if such suit or action had been rightfully and originally commenced therein, and shall proceed to hear and determine the same accordingly, and the proper process for the due execution of the judgment or decree rendered therein, shall run into and may be executed in the district where such judgment or decree was rendered, and also, into the district from which such suit or action was removed.

APPROVED, February 28, 1839.

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No. 288

In the Supreme Court of the United States

October Term, 1944

W. S. D. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1944

No. 289

W. S. D. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 47–51) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 29, 1944 (R. 51). The petition for a writ of certiorari was filed July 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTION PRESENTED

Whether an action brought by the United States to collect the unpaid portion of a fine imposed seventeen years before in a federal criminal proceeding is barred by R. S. § 1047 (28 U. S. C. 791) which provides a five-year period of limitation on a "suit or prosecution for any penalty or forfeiture."

STATUTES INVOLVED

R. S. § 1041 (18 U. S. C. 569) provides in part:

> In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. * * *

R. S. § 1047 (28 U. S. C. 791) provides in part:

> No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued. * * *

STATEMENT

On April 22, 1924, petitioner was convicted in the United States District Court for the Southern District of California, on an indictment in three counts charging him with smuggling liquor into the United States, in violation of Sections 593 and 813 of the Tariff Act of 1922, and with conspiring to do so, in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 6–7, 10–20, 22–23). On April 25, 1924, he was sentenced to imprisonment for two years on each count, the terms to run concurrently, and to pay a fine of $10,000 on the first count, $1 on each of the other counts, and to stand committed until the fine was paid (R. 7, 23–25). Petitioner served the term of imprisonment (R. 7), and after completion of his sentence, being without funds to pay the fine, he served an additional thirty days, executed a pauper's oath, and was thereupon discharged from imprisonment (R. 7). Thereafter an execution was issued on the judgment imposing the fine, and $51.35 was collected (R. 7).

In 1928 petitioner became a resident of the State of Washington (R. 8). No further sums were realized on the judgment of conviction, and no further proceedings were had (R. 33) until April 1, 1941,[1] when the United States in-

[1] The date April 1, 1921, appearing at page 4 of the record is manifestly erroneous. The date April 1, 1941, appears in

stituted the present suit in the United States District Court for the Western District of Washington to obtain a judgment based upon the judgment of the District Court for the Southern District of California (R. 2–4).

A trial was had upon an agreed statement of facts (R. 31), after which the district court entered findings of fact (R. 31–33) and conclusions of law holding that the United States was entitled to judgment (R. 33–34). Judgment was entered against petitioner for $9,950.65 and costs (R. 35). On appeal, the judgment was affirmed by the Circuit Court of Appeals (R. 51).

ARGUMENT

Petitioner's sole contention is that the suit instituted by the Government in 1941 seeking a new judgment based on the 1924 judgment of the convicting court is a suit for a "penalty" within the meaning of R. S. § 1047 (*supra,* p. 2) and, accordingly, is barred by the provision of Section 1047 that "no suit * * * for any penalty * * * accruing under the laws of the United States, shall be maintained * * * unless the same is commenced within five years from the time when the penalty * * * accrued." Since an action to obtain a new judgment on the basis of an earlier criminal judgment imposing a fine is not an action for a penalty, we submit that petitioner's contention is without merit.

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the opinion of the Circuit Court of Appeals (R. 48) and in the petition for certiorari (Pet. 3).

The history of R. S. § 1047 and the cases decided thereunder make it clear that the suit for a penalty or forfeiture which is barred by the five-year limitation is one in which the action is upon a statutory liability. The suit must be brought within five years after the penalty accrued—when the violation of law took place. *United States* v. *Maillard,* 26 Fed. Cas. No. 15709 (D. N. Y.). The statute does not apply to a new suit brought to collect the penalty assessed. Cf. *Durning* v. *McDonnell,* 86 F. (2d) 91, 92 (C. C. A. 2) and cases there cited. R. S. § 1047 appears to have originated in the Act of March 2, 1799, 1 Stat. 627, c. 22, entitled "An act to regulate the collection of duties on imports and tonnage." (See note to 28 U. S. C. 791.) Section 89 of that act provided the method whereby "penalties, accruing by any breach" of the act could be sued for and recovered, with a proviso declaring that "no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred." See *Stockwell* v. *United States,* 13 Wall. 531, 542–543. Thereafter, Section 4 of the Act of February 28, 1839, 5 Stat. 322, extended the time within which to institute suits or prosecutions for "any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the

United States" to five years "from the time when the penalty or forfeiture accrued." The quoted words now appear in R. S. § 1047. The Circuit Court of Appeals properly held, we think, that this phraseology "has reference merely to the time of the commission of the offense or the doing of the act by which the penalty or forfeiture was incurred" (R. 50).[2] It imposes no time limit upon the enforcement of a penal judgment.

The Government's right to enforce the payment of a fine imposed by a judgment in a criminal case may be effectuated by using the procedure provided by Section 1041 of the Revised Statutes (*supra,* p. 2). That section provides that a judgment in a criminal case imposing a fine "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced," and no period of limitation upon such a proceeding is specified.

---

[2] Petitioner asserts (Pet. 6) that the construction referred to is erroneous, since, in reaching it, the court was guided by the similar construction it gave to the 1799 Act (R. 49). According to petitioner, the 1799 Act was limited to a specific class of cases, while the Act of February 28, 1839, covered all cases of penalties or forfeitures. However, we think the distinction is without significance. The most that can be attributed to the 1839 Act in this regard is an extension of the limitation provision to all penalties or forfeitures. The 1839 Act did no more affect or comprehend enforcement of criminal judgments than did the 1799 Act. It may be noted that it has been held that the time limitation set forth in Section 4 of the 1839 Act has no application to a prosecution for an offense punishable by imprisonment. *United States* v. *Brown*, 24 Fed Cas. No. 14,665 (D. Mass.).

The Government is not restricted, however, merely to levying an execution but may resort to customary procedures in aid of execution, such as a creditor's bill (*Pierce* v. *United States,* 255 U. S. 398)[3] or an action on the judgment itself (*Custer* v. *McCutcheon,* 283 U. S. 514, 519; *Schodde* v. *United States,* 69 F. (2d) 866 (C. C. A. 9)).[4]

Unless R. S. § 1047 is applicable to an action upon a criminal judgment imposing a fine, there is, as stated by the Circuit Court of Appeals (R. 49), no time limitation controlling the enforcement of such a judgment. Certainly, where the Government endeavors to collect a fine by the specific method of execution provided by R. S. § 1041, R. S. § 1047 is not called into operation. Accordingly, it should not be any more applicable merely because enforcement is sought through a suit in aid of execution.

While it may be, as urged by petitioner (Pet. 7–8), that the word "penalty" for some purposes comprehends a fine,[5] we submit that R. S.

[3] In the *Pierce* case, this Court held that Section 1041 permitted the Government to enforce a criminal judgment against a corporation by a creditor's bill against the transferees of the corporate assets.

[4] In the *Custer* case, it was stated that a civil judgment in favor of the Government could be enforced by an action upon the judgment. Such an action was also upheld in the *Schodde* case.

[5] In view of the varied meanings accorded the word "penalty" (Cf. *Huntington* v. *Attrill,* 146 U. S. 657, 666–667; *United States* v. *Tsokas,* 163 Fed. 129, 130 (D. N. Y.)),

§ 1047, upon which petitioner relies, is not intended to cover proceedings of a supplemental nature directed towards the enforcement of a judgment rendered upon conviction of a crime. We believe that a reasonable construction of that section leads to the conclusion that it is limited to direct suits or prosecutions for the imposition of a penalty or forfeiture.

Petitioner also suggests (Pet. 10–11) that to hold R. S. § 1047 inapplicable under the circumstances presented by this record is inequitable, for although he has served his term of imprisonment and an additional thirty days for nonpayment of the fine, the Government is still endeavoring to collect the fine more than five years after its imposition, thereby in effect subjecting him to a continuing liability. However, it is settled that an indigent convict, who, like petitioner, is committed until his fine is paid and is thereafter discharged from further imprisonment upon taking a pauper's oath, pursuant to 18 U. S. C. 641,[6] is not thereby relieved from the obligation to pay the fine imposed by the judgment of conviction. *Grier* v. *Kennan,* 64 F. (2d) 605, 606 (C. C. A.

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cases not dealing with the precise question here presented are of no aid. None of the cases cited by petitioner are concerned with that question.

[6] R. S. §§ 1042 and 5296 (18 U. S. C. 641) provide in part:

"When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, * * * has been confined in prison thirty days, solely for the nonpayment of

8); *United States* v. *Pratt,* 23 F. (2d) 333 (D. N. H.).

CONCLUSION

The case was correctly decided below. There is involved no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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such fine, or fine and costs, such convict may make application in writing to any commissioner of the United States court in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of $20, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.' Upon taking such oath such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts. * * *"

U. S. GOVERNMENT PRINTING OFFICE: 1944